In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-724

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND BRADY-HAMILTON STEVEDORE CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

This case grows out of the same labor dispute which is involved in *International Union of Operating Engineers, Local 701* v. *International Longshoremen's & Warehousemen's Union, Local 50,* No. 74-656.

1. Since November 1966, Brady-Hamilton Stevedore Company (Brady-Hamilton) has leased four "whirly-type" floating barge cranes from Willamette Western Corporation for use in its log loading operations at the port of Astoria, Oregon (Pet. App. 3a-4a). Under the leasing arrangement, Willamette furnished eight employees to operate the cranes who, under the agreement, were "deemed for all purposes" employees of the lessee (Pet. App. 4a). These employees were members of petitioner Union (Engineers), which had a collective agreement with Willamette (*ibid.*).

In April 1969, as a result of a work stoppage by International Longshoremen's & Warehousemen's Union, Local 50 (Longshoremen), with which it had a collective bargaining agreement, Brady-Hamilton discharged the eight employees furnished by Willamette who were members of Engineers, and assigned the work of operating the "whirly" cranes to its own employees, represented by Longshoremen (Pet. App. 5a-7a). Engineers filed an unfair labor practice charge with the Board alleging that the work stoppage by Longshoremen was in furtherance of a jurisdictional dispute at Brady-Hamilton's premises and violated Section 8(b)(4)(D) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(D). Engineers also filed a charge alleging that the discharge of its members violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1) (Pet. App. 5a-7a).

The Board, in an effort to resolve the underlying jurisdictional dispute, determined, in a proceeding under Section 10(k) of the Act, 29 U.S.C. 160(k), that employees represented by Engineers were entitled to perform the disputed work, and that Longshoremen was therefore prohibited by Section 8(b)(4)(D) from forcing Brady-Hamilton to assign the work to employees whom it represented. 181 NLRB 315. When Longshoremen refused to comply with the Board's 10(k) determination, a complaint issued on the 8(b)(4)(D) charge, and the Board subsequently found Longshoremen to have violated that provision of the Act. 93 NLRB 266.

Thereafter, the Board (with two Members dissenting) held that Brady-Hamilton did not violate Section 8(a)(3) and (1) of the Act when it discharged members of Engineers in order to replace them with members of Longshoremen, and dismissed the complaint which had issued on the charge against Brady-Hamilton (Pet. App. 2a-24a). The Board concluded that Section 8(a)(3) was

not "applicable in situations where the actions of all parties are part and parcel of an acute, bona fide jurisdictional work dispute" (Pet. App. 10a-11a). Rather, "the 10(k)—8(b)(4)(D) sections of the Act dictate the procedure the Board is to follow in work assignment dispute situations" (Pet. App. 12a), and, under that procedure, the only remedy available to "the successful union in the 10(k) proceeding" is the freedom "to engage in economic pressure against the [employer] to enforce the award without running afoul of Section 8(b)(4)(D)" (Pet. App. 14a).

2. The court of appeals set aside the Board's order against Longshoremen in the 8(b)(4)(D) case, and remanded that case to the Board for reconsideration of the underlying 10(k) award in favor of Engineers (Pet. App. in No. 74-656, 1a-19a). This is the subject of Engineers' petition for certiorari in No. 74-656.[1] The court of appeals also denied Engineers' petition to review the Board's order dismissing the 8(a)(3) and (1) complaint against Brady-Hamilton, on the ground that "[t]he prayer for relief was predicated upon the Board's award of work to the Engineers" which the court had previously set aside (Pet. App. 1a). The instant petition for certiorari seeks review of the latter court of appeals decision.

3. The question presented by the petition—whether the procedures of Sections 10(k) and 8(b)(4)(D) of the Act are the exclusive means of correcting a wrongful replacement of one group of employees with another group of employees which occurs in a jurisdictional dispute—is not ripe for review. The court of appeals did not

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[1]While the Board did not file its own petition, it does not oppose the granting of the Engineers' petition. See Memorandum for the National Labor Relations Board in No. 74-656.

reach that question because, in its view, the propriety of the discharge of Engineers' members turned on the validity of the Board's 10(k) award in favor of Engineers, which the court had remanded for further Board consideration. In these circumstances, we suggest that this Court hold the present petition pending a decision on the petition in No. 74-656, and then dispose of it in accordance with that decision.

Respectfully submitted.

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Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

~~JANUARY~~ February 1975.